

Office of Chief Counsel
Internal Revenue Service

memorandum

CC:LM:CTM:LN:TL-N-1056-01

EYWu

date:

to: Vivian Lin, International Examiner
LMSB: 1446, Laguna Niguel

from: June Y. Bass, Associate Area Counsel, LMSB
Erica Y. Wu, Attorney

subject: Issues: Validity of Form 872; Executing Forms 872
Taxpayer: [REDACTED] (EIN [REDACTED])
Statute of Limitations: [REDACTED] (Form 1120)
[REDACTED] (Form 1120)
[REDACTED] (Form 1042)

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This memorandum responds to your telephone inquiry on February 14, 2001, concerning the validity of a Form 872 you have secured and the proper captions for the Forms 872 you plan to secure. This advisory has been coordinated with CC:PA:APJP:2 of the National Office.

ISSUES

1. Whether a Form 872 erroneously captioned in the name of [REDACTED] is valid.
2. For the following tax liabilities (a) how should the Form 872 be captioned, and (b) who may sign the Form 872?
 - a. [REDACTED] income taxes (Form 1120);
 - b. [REDACTED] income taxes (Form 1120); and
 - c. [REDACTED] withholding taxes (Form 1042).

CONCLUSIONS

1. Yes, the Form 872 extending the assessment period to [REDACTED], is valid even though it is erroneously captioned. You should, however, inform Taxpayer as to the caption error before securing a further extension.
2. (a) With respect to the Form 872 for [REDACTED] income taxes, the caption should read: "[REDACTED] (EIN [REDACTED]) (formerly known as [REDACTED])"

The "kind of tax" blank should be filled in to read "income tax."

The form may be signed by a duly authorized officer of [REDACTED], or an agent or attorney who is specifically authorized to execute the form by a power of attorney.

- (b) With respect to the Form 872 for [REDACTED] income taxes, the caption should read: "[REDACTED] (EIN [REDACTED]) (formerly known as [REDACTED])"

The "kind of tax" blank should be filled in to read "income tax."

The form may be signed by a duly authorized officer of [REDACTED], or an agent or attorney who is specifically authorized to execute the form by a power of attorney.

(c) With respect to the Form 872 for the [REDACTED] withholding taxes, the caption should read: "[REDACTED] (EIN [REDACTED]) (formerly known as [REDACTED])"

The "kind of tax" blank should be filled in to read "withholding tax under §§ 1441-1464."

The form may be signed by a duly authorized officer of [REDACTED], or an agent or attorney who is specifically authorized to execute the form by a power of attorney.

FACTS

[REDACTED] ("[REDACTED]"), a California corporation, was a wholly owned subsidiary of [REDACTED], a Japanese corporation. [REDACTED] filed its [REDACTED] income tax return, [REDACTED] income tax return, and [REDACTED] withholding tax return on [REDACTED], [REDACTED], and [REDACTED], respectively. [REDACTED]'s EIN was [REDACTED].

The [REDACTED] Reorganization

In [REDACTED], [REDACTED] and its related entities adopted a reorganization plan which led to the following transactions:

- [REDACTED] changed its name to [REDACTED] ("[REDACTED]").

- [REDACTED] contributed all of its stock ownership in another corporation named [REDACTED] ("[REDACTED]") to [REDACTED].

- [REDACTED] transferred certain assets and liabilities in exchange for additional shares of [REDACTED]'s stocks; [REDACTED] became the holder of [REDACTED]% ownership interest in [REDACTED].

- [REDACTED] changed its name to [REDACTED].

- A new corporation was formed and named "[REDACTED] [REDACTED]" ("[REDACTED]"). [REDACTED]'s EIN is [REDACTED].

- [REDACTED] transferred certain assets and liabilities in exchange for all of [REDACTED]'s stock; [REDACTED] became a wholly-owned subsidiary of [REDACTED].

The net effect of the foregoing transactions is that [REDACTED] became the parent company of [REDACTED] and [REDACTED].¹

[REDACTED] and its two subsidiaries ([REDACTED] and [REDACTED]) filed a consolidated return for the [REDACTED] tax year. This [REDACTED] return shows the taxpayer's name as "[REDACTED] (formerly [REDACTED], [REDACTED])" and the EIN as [REDACTED].

Executed Form 872 for [REDACTED]

On [REDACTED], the Service obtained a Form 872 to extend the assessment period for [REDACTED]'s [REDACTED] income taxes to [REDACTED]. This form was captioned "[REDACTED], [REDACTED]", bore [REDACTED]'s EIN, and was signed by [REDACTED]. [REDACTED] was the president of [REDACTED] at the time this Form 872 was executed.

Additional Forms 872 for [REDACTED] and [REDACTED]

Exam now wants to further extend the assessment period for the [REDACTED] income taxes to [REDACTED]. Exam also wants to extend the assessment periods for the [REDACTED] income taxes and withholding taxes to [REDACTED].

DISCUSSION

1. Validity of the executed Form 872

Generally the Service must make an assessment of tax within three years after the return is filed. See I.R.C. § 6501(a). However, I.R.C. § 6501(c)(4) authorizes an extension of the period of limitations for assessment, provided that the agreement is executed prior to expiration of the limitation period then in effect. If a period of limitation specified by statute has already expired, it cannot be extended by agreement. Treas. Reg. § 301.6501(c)-1(d); Rev. Rul. 85-67, 1985-1 C.B. 364; See also United States v. Garbutt Oil Co., 302 U.S. 528, 533-34 (1938). Hence, if the Form 872 executed on [REDACTED] was invalid, the Service would not by a second Form 872 be able to re-institute the assessment period for the [REDACTED] income taxes, which

¹ [REDACTED] continued to be a wholly-owned subsidiary of [REDACTED].

would have already expired on [REDACTED].²

In this case, the Form 872 was not correctly captioned. At the time the Service secured this form, [REDACTED] had already changed its name to [REDACTED]. The caption should have read: "[REDACTED] (EIN [REDACTED]) (formerly known as [REDACTED])" Despite the caption error, for the reasons below, we do not believe this defect is fatal to the validity of the form.

- A. Both Taxpayer and the Service intended the Form 872 at issue to extend the assessment period for [REDACTED]'s [REDACTED] income taxes.

Although a Form 872 is not considered to be a contract, courts have nevertheless applied contract principles in determining its validity because I.R.C. § 6501(c)(4) requires that the parties reach a written agreement as to the extension. Piarulle v. Commissioner, 80 T.C. 1035, 1042 (1983). The term agreement means a manifestation of mutual assent. Piarulle, supra, at 1042. It is the objective manifestation of mutual assent as evidenced by the parties' overt acts that determines whether the parties have made an agreement. Kronish v. Commissioner, 90 T.C. 684, 693 (1988).

In this case, the undisputed facts clearly establish that both the Service and Taxpayer intended the Form 872 at issue to extend the assessment period for [REDACTED]'s [REDACTED] income taxes. The only entity under examination at the time the Form 872 was executed was [REDACTED]. The Form 872 listed [REDACTED]'s EIN, identified [REDACTED] as the tax year involved, and was signed by the president of [REDACTED]. The reference to "[REDACTED] [REDACTED]" alone in the caption apparently was the result of a mutual mistake³ of the parties.

The erroneous caption may result in confusion as to whether the Form 872 relates to [REDACTED], or [REDACTED], since both shared the same name. However, since [REDACTED] did not come into

² As indicated above, the [REDACTED] income tax return was filed on [REDACTED].

³ A mutual mistake exists "where there has been a meeting of the minds of the parties and an agreement actually entered into but the agreement in its written form does not express what was really intended by the parties." Woods v. Commissioner, 92 T.C. 776, 782 (1989), quoting Black's Law Dictionary 920 (5th ed. 1979).

existence until [REDACTED], the Form 872's reference to the [REDACTED] tax year must refer to [REDACTED], not [REDACTED].

- B. The Form 872 may be revised to conform with the parties' intention under the doctrine of equitable reformation.

Where a Form 872 does not conform with the actual agreement between the parties, a court may reform the contents to conform with the parties' intention. Woods v. Commissioner, 92 T.C. 776, 789(1989).

In Woods, the taxpayers executed a Form 872 for the 1978 tax year. The Form 872 was limited to adjustments relating to the taxpayer's investment in a S-corporation. Subsequently, the taxpayers executed a Form 872-A which failed to reflect the correct name of the S-corporation. The Tax Court found that at the time each extension was executed, both the taxpayers and the Service intended that the extensions would allow the Service additional time to complete its examination of the taxpayers' 1978 tax return. The Tax Court held that the Form 872-A contained a mutual mistake of fact and therefore reformed the Form 872-A to reflect the parties' actual agreement.

Here, the Form 872 also contained a mutual mistake of fact in that the caption mistakenly failed to identify [REDACTED] as the current name of [REDACTED]. Such defect is a mere drafting error and a court should reform the form to reflect the proper caption. The form, therefore, effectively extends the assessment period for [REDACTED] income taxes to [REDACTED], thereby allowing the Service to secure a further extension at this time. You should, however, inform Taxpayer of the error in the caption before obtaining a further extension.

2. Additional Forms 872

It appears from the [REDACTED] reorganization that [REDACTED] merely underwent a name change. Thus, the Forms 872 for the [REDACTED] income taxes, [REDACTED] income taxes, and [REDACTED] withholding taxes, should all be captioned: "[REDACTED] (EIN [REDACTED]) (formerly known as [REDACTED])"

The "kind of tax" blanks for the [REDACTED] and [REDACTED] income taxes should be filled in to read: "income tax." The same blank for the [REDACTED] withholding taxes should be filled in to read: "withholding tax under § 1441-1464."

Each form may be signed by a duly authorized officer of [REDACTED], or an agent or attorney who is specifically

authorized to execute the form by a power of attorney.

If you have any questions, please contact Erica Wu at
(949)360-3433.